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# Sherman Jones et al v. Alvie L. Thorvaldson et al : Brief of Appellants

Utah Supreme Court



Dave McMullin; Dallas H. Young; Attorneys for Appellants;
Jackson B. Howard; Howard & Lewis; Attorney for Respondent;

# In the Supreme Court of the State of Utah



SHERMAN JONES, MERLE JONES, BRYANT JONES and LARAINE JONES,
Plaintiffs and Appellants,

vs.

ALVIE L. THORVALDSON, E. NOREEN THORVALDSON, MERRILL OLDROYD and O. THAYNE ACORD,
Defendants and Respondents.

CASE NO. 10043

## APPELLANTS' BRIEF

Appeal from Judgment of the Fourth District Court
of Utah County
Hon. Maurice Harding, Judge

DAVE McMULLIN
20 East Utah Avenue
Payson, Utah

DALLAS H. YOUNG for
YOUNG, YOUNG & SORENSEN
227 North University Avenue
Provo, Utah
Attorneys for Appellants

JACKSON B. HOWARD for
HOWARD & LEWIS
290 North University Avenue
Provo, Utah
Attorney for Respondent

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### STATEMENT OF FACTS

The Jones instituted this action by filing a complaint asking for a declaratory judgment to determine to whom they should pay royalty for gravel obtained by them from property owned by Merrill Oldroyd and by him leased to the Thorvaldsons. The Thorvaldsons filed a counterclaim against the Jones and at the end of the trial on the counterclaim the Court found that the Jones had forfeited their rights in the leased property for an implied covenant.

The only parties in this case on appeal are the Jones and the Thorvaldsons. The action between the Thorvaldsons and the Oldroyds and Acord was disposed of prior to the trial of the case between the Jones and the Thorvaldsons. In that action the Court held that the Thorvaldsons held no interest in the Oldroyd property, this being a gravel pit mentioned in the lease hereinafter set forth. The Thorvaldsons have not appealed from that decision. Hereafter, reference to the parties will be as Jones and Thorvaldsons.

The question in this case is whether the Jones' alleged violations of the terms of a written lease, the applicable parts of which are set forth below, are such as to authorize the trial Court to find that the Jones had forfeited their rights in the property described in said lease.

We set forth the pertinent parts of the lease entered into between Thorvaldsons and Jones: TR. 8.

"This agreement, made and entered into this 11th day of December, A. D. 1957, by and between Alvie L. Thorvaldson and E. Noreen Thorvaldson, his wife, of Payson, Utah County, State of Utah, hereinafter called the Parties of the First Part, Lessors, and Sherman Jones and Merle Jones, his wife, and Bryant Jones and Laraine Jones, his wife, of Delta, Millard County, State of Utah, hereinafter called the Parties of the Second Part, Lesees.

WITNESSETH:

"That the Lessors, Parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter contained on the part of the Lessees to be paid, kept and performed, have granted, demised, leased, assigned, and by these presents do grant, de-

mise, lease, assign and let unto the Lessees, for the purpose of operating, mining, producing and marketing such quantities of sand, gravel, top soil and fill dirt as may be found in and on the certain tracts of land which the parties of the first part represent they are the owners in fee simple title, which property is more particularly described as follows:

(Description of land omitted)

"And that certain parcel of land which the parties of the first part have, by contract and agreement, acquired from Merrill L. Oldroyd and Lola Oldroyd, his wife, of Payson, Utah, which property is described as follows:

(Description of land omitted)

"It is agreed that the lease to the first mentioned property and the assignment of agreement and lease to the second described property shall continue in force and effect for a period of twenty years, from the first day of January, 1958, to the first day of Janaury, 1978, with the exclusive right granted to the Lessees herein to renew the said lease for an additional twenty years in accordance with the provisions and stipulations in this agreement contained. It is agreed that the Lessees shall take possession, operate and sell gravel, sand, soil and dirt from the said premises on and after January 1, 1958.

"In consideration of the premises, the Lessees and Assignees herein covenant and agree to deliver or pay to the Lessors 25 cents for each cubic yard of sand, gravel or top soil mined, processed, or produced from the said premises and by the Lessees disposed of on the market, and they also agree to pay to the Lessors one cent for each cubic yard of fill dirt removed from the said premises . . . . Lease payments shall be

made to the Lessors at Payson, Utah, unless other address is provided to the Lessees. Payments shall be made between the first and tenth days of each three month calendar period.

"It is agreed that the books of the Lessees shall be accessible to the Lessors for the purpose of computing the output of such marketed sand, gravel and dirt at all times. Duplicate sales slips shall be preserved in numerical order and at regular three-month intervals shall be subject to inspection by the Lessors. The Lessors shall also have access to the pits and premises at all times for the purpose of comparison by way of quantity of sand and gravel removed therefrom.

". . . . The Lessees agree to keep all overburden removed which would in any way inhibit or retard the success of the business.

. . . . . .

"If the Lessors own a less interest in the above described lands than herein represented, then the royalties and rentals herein provided for shall be paid the Lessors only in proportion which their interest bears to the whole and undivided fee.

"It is further stipulated and agreed between the parties hereto that the Lessees shall conduct the said business in such a manner as to adequately and timely fill all orders and supply all requests of customers. If the Lessees fail to operate the business in a proper, businesslike and workmanlike manner and/or fail because of business practices to keep up with the demand, the same will constitute grounds for forfeiture of this lease."

The Court found that the Jones' failure to perform any one of the following things constituted grounds to de-

clare that Jones had forfeited their right in the leased property:

(1) Failure to remove the overburden ;

(2) Failure to make sales slips for materials reasonably soon after the sale of the said materials and delivery of the material to the customer;

(3) That the Jones removed sand and gravel off the premises without accounting for any of it;

(4) They abandoned the business of selling sand and gravel on the leased premises and removed their activities off the leased premises;

(5) Failure to account for all sales of sand and gravel.

The evidence respecting those issues is as follows:

FAILURE TO REMOVE OVERBURDEN

Mr. Isaah Rex Allen, called as a witness by the Thorvaldsons. He testified that further operation of the pit was prevented because the overburden was not removed. TR. 140. He further testified that in removing the overburden, it could easily affect 1,000 yards. This witness said it would take at least ten eight-hour days to remove the overburden. TR. 142-143. Mr. Allen stated that so far as he knows the Jones could be taking sand from the pit at the time of the trial. He said the sand would be too dirty for cement purposes. TR. 145.

Grant E. Lloyd, a son-in-law of the Thorvaldsons, and Thorvaldsons' witness for them, testified: "There would be at least three days work to get this big pit in good shape again." TR. 246.

Thorvaldson testified that in his judgment there would be about 1,000 yards of sand contaminated. TR. 185.

Jones testified that he has never had any concrete rejected because of dirt in it. TR. 272-273. Jones stated that he was not having any trouble with the overburden and can remove the overburden without hazard to a driver. TR. 24. Jones testified that this overburden was there when they leased the property from Thorvaldsons. TR. 181.

FAILURE TO MAKE SALES SLIPS

Leon Woodfield, a Certified Public Accountant called as a witness by Thorvaldsons, testified as follows: "In connection with the audit and comparing the recorded information that I found in reports given to me by Mr. Jones, I found some differences. For example, during the period of October, ending Oct., 1961, there was a difference of 37.80 tons or cubic yeards, excuse me." TR. 131. That was out of a total reported by Jones to him of 829.70 yards. "In April of 1963, there was a difference of 8.5 out of 536. There was also a difference in the sand and gravel of 5.0 out of a total of 145. And then in May of 1962, with respect to the sand, out of 170, there was a difference of .25 and for the gravel, 136, there was 2 - ¼." TR. 132.

The witness also testified that in his experience in auditing items of this kind that it was not unusual to locate or find differences of this small amount. TR. 132. He further testified that there are normally small differences in the audit. TR. 132. In the last quarter there were larger differences between the report going to Mr. Thorvaldson and the reported sales that are not included on the report. TR. 132.

Jones testified: "We keep our invoices in numerical order and do not make them at the end of the quarter". TR. 170. He further stated: "As I explained before, if a person in the case of a contract orders so many linear feet of ditch, we go ahead and we keep track of the amount of material we put in that ditch until that project is done and then we will see if that is all he needs and get it approved and make sure that is all he will need, and then I will make up the invoice." TR. 171.

"Question: Sometimes you are so busy that you can't make them up for two or three days, is that not true?

"Answer: The only case that they may not be made up for two or three days is if I have not received a report from one of the other fellows or that I am out of town and I am not there to take care of it." TR. 171.

Mr. Thorvaldson was asked: "It is true, isn't it Mr. Thorvaldson, that in that whole year's time, the auditor found a difference between the records of the Jones and that which they had reported to you of only 43.8 yards?" TR. 227.

"Answer: I don't remember exactly. He wasn't able to determine entirely, according to what he said. He said he couldn't get an accurate account." TR. 227.

The witness, Thorvaldson, in testifying about what the audit disclosed, testified that the second audit found a shortage, but the first one wasn't too bad, and that after the first audit had been made, Jones sent him a check for $112.42. This covered a six months period. TR. 189-191.

REMOVAL OF SAND AND GRAVEL WITHOUT ACCOUNTING FOR IT.

Jones, in testifying about the amount of sand stockpiled, stated: "There is no large amount stockpiled. There may be 100 yards now." TR. 163.

## POINT I

THE COURT ERRED IN FINDING THAT THE JONES ABANDONED THE LEASED PROPERTY AND FORFEITED THEIR RIGHT THEREIN BY FAILURE TO MAINTAIN A MIX BATCH PLANT ON THE LEASED PREMISES AND THAT UNLESS THE MIX BATCH PLANT WAS MAINTAINED ON THE PREMISES AND ALL PROCESSING DONE THEREON THE CONTRACT CONTAINED NO CONSIDERATION.

The lease above referred to was reformed to include land not described in the lease. TR. 68. The Court, in drawing the boundary line between the property leased to Jones and that retained by Thorvaldson, awarded Thorvaldson property upon which a well was located from which water was used to operate a mix batch plant (TR. 237) and also a portable mix batch plant. TR. 236. Later, Jones purchased five acres of land adjoining the Thorvaldson property upon which he built a mix batch plant and sunk a well at a cost of $2,000.00. TR. 280. Thereafter, all processing was done on the Jones property. TR. 110. Jones went into possession of the leased property in January, 1958, and from that time until he was evicted from said premises by order of the Court, continued to dig and mine sand from the property owned by Thorvaldson and gravel

from the property Thorvaldson had leased from Oldroyd, and sold and delivered the same to customers. It is evident from the Court's comments during the trial that the Jones' failure to do all of their processing on the Thorvaldson property was the real reason why the Court declared a forfeiture. The Court asked the attorney for Thorvaldson to define the issues. Counsel replied, "They have moved off the property completely". TR. 109. The Court asked, "Have they moved the business from the premises?" Counsel for Jones answered, "So far as the batch plant is concerned they have." TR. 110. Counsel for Thorvaldson, reading from the deposition of Jones: "You didn't pay any royalty on that material you process and manufacture on your own property?" Answer: "Only that we removed from the leased property". Question to Jones by attorney for Thorvaldson: "Do you have any requirement to take any material from Mr. Thorvaldson's property?" Answer: "No, there is no determined amount." Then the Court said, "I am afraid you have got a forfeiture here, Mr. Hodgson". TR. 111.

The Court further said: "I am saying this in view of what we said in the other case and considering the testimony we had there and the arguments and all. And it was one of the requirements, an indispensable requirement of the validity of the lease that they maintain that business on those leased premises; to mine the sand and gravel and process it there so that there would be consideration, and it had to be done in a manner that would take care of the business and the customers for that kind of business. Now, if they have moved off the property and processed elsewhere and get materials from other sources as well, then there is

a forfeiture of this lease, a failure of consideration." TR. 111-112.

The Court said that the Jones were required to maintain the business on the premises and as authority for that proposition stated: "Well, there is the requirement that they maintain the business on the premises. (Quoting from the lease agreement) 'It is further stipulated and agreed between the parties hereto that the Lessees shall conduct the said business in such a manner as to adequately and timely fill all orders and supply all requests of customers.'" TR. 114.

Mr. Hodgson: "Now it doesn't say, Your Honor, that they conduct it upon the leased premises."

The Court: "No, those words are not in there, but they are implicit to give validity to the lease." TR. 115.

The Court: "As I remember the testimony in the other case there was a business on the premises being conducted, and this business was sold lock-stock and barrel to the Jones boys. They bought all the equipment and then he took a lease on the premises and agreed to pay so much royalty for materials that went through that business—sold from that business. And that was where Mr. Thorvaldson was going to derive his revenue. There would be no consideration if they could just take that lease and hold it for 20 or 40 years and process and operate across the street or at some other location. The lease would lack consideration." TR. 115.

Mr. Hodgson: "But I think we have to go look at the whole of the lease and the whole of the situation, your Honor." TR. 115.

The Court: "I think that's right. I think you are

right. We have to look at the whole thing." TR. 115.

Mr. Hodgson: "Part of this business was not just the processing of sand which was taken from the Thorvaldson sand pit, and gravel which was taken from the Oldroyd gravel pit and made into ready mixed concrete. Btu part of the business was, and is, and will be in the future, the taking of sand and top soil and fill dirt or overburden from the sand bed properties and selling them to customers who come there for no other purpose than to purchase them irrespective of whether there is a batch plant there or a batch plant a hundred yards down the road; and part of the conducting of that business, the business which is the overall business of sand, gravel, and concrete, is still being conducted and must still be conducted under the terms of this lease, irrespective of where these men have their batch plant. It can still be conducted out at that pit, irrespective of whether they have a batch plant on it or not." TR. 115-116.

The Court: "Part of it, but the processing is not done there anymore, is it?" TR. 116.

Mr. Hodgson: "No." TR. 116.

The Court: "Then you would probably admit there is a partial failure of consideration? Mr. Thorvaldson gets no revenue from any of the processing?" TR. 116.

Mr. Hodgson: "That isn't true, because the sand which they still use must come from the sand bed irrespective of where it's batched out. And until March 1st, the gravel which was used came from the Oldroyd pit which was under the lease, and which, through no cause of these plaintiffs, is now terminated." TR. 116.

The Court: "Well in my mind now that you have ad-

mitted that the batch plant has been removed and the processing no longer takes place there, to my mind, that constitutes a sufficient breach to work a forfeiture of the lease. Now, the Supreme Court might not say so, if you appeal to the Supreme Court. Therefore, you better produce all your evidence." TR. 118.

We again quote from the Court: "Yes it was. That he had to pay Mr. Thorvaldson for all materials processed on the premises; and it was within the contemplation of the parties that he would process on the premises or that word wouldn't have been in there." TR. 113.

Mr. Hodgson stated: "That is true, but nothing was said in that case nor in the decision in that case as to the requirement that they continue to bring all materials that they might purchase onto those premises and process them." TR. 114.

The Court replied: "Well, there is the requirement that they maintain the business on the premises: 'It is further stipulated and agreed between the parties hereto that the lessee shall conduct the business in such a manner as to adequately and timely fill all orders and supply all requests of customers.'" TR. 114.

The Court further said: "I think so far now there has been no sufficient evidence to justify a forfeiture on the ground of failure to take care of the business. But there, as I mentioned yesterday, the removal of the business from the premises makes an entirely situation." TR. 181.

The contract specifically provided the reason why a forfeiture could be declared by the Thorvaldsons, and the Thorvaldsons, after calling one witness in an attempt to

show that the Jones had failed to conduct the business in such a manner as to adequately and timely fill all orders and supply all requests of customers, abandoned that theory and the Court made no finding with respect thereto.

In reaching its conclusion, the Court declared a forftiture for something which the contract did not require the Jones to do, to-wit: maintain a mix batch plant on the Thorvaldson property.

The evidence shows that from the early part of January, 1958, until they were evicted from the premises by the Court in 1962, the Jones were mining and selling sand from the Thorvaldson property and selling it to customers. TR. 115.

Just how the maintenance of the mix batch plant on the Thorvaldson property would promote the sale of sand and gravel to a greater extent than the place where it was maintained was not explained by the evidence. The maintenance of the batch plant on the Thorvaldson property would not promote the sale of sand or gravel in their raw state to customers who came to the premises for either of these products. The maintenance of the batch plant could not possibly affect the removal of the overburden or work of the auditor in auditing the Jones books or to change their method of keeping books. It would not deter or aid an engineer in making a topographical survey to see how much sand and gravel had been removed.

As a general rule, the Courts hold that tenancies cannot be terminated unless there is a forfeiture clause contained in the contract. See 51 CJS, 683, "Landlord and Tenant", Section 104. We quote:

"Necessity for Foreclosure Clause. In general a tenancy cannot be terminated for breach of covenant by the lessee unless there is an express provision in the lease for forfeiture or right of re-entry in such case.

"In the absence of a statute to the contrary, tenancy cannot be terminated for a breach of covenant by the lessee unless there is an express and distinct provision in the lease for forfeiture or right of re-entry on the occurrence of the breach or unless the breach disaffirms or impugns the title of the lessor and tends to defeat the reversion."

We quote from 32 Am. Juris., Sec. 848, page 721:

"A stipulation giving the lessor the right to re-enter and declare a forfeiture for the breach of specified covenants of the lease impliedly excludes the right to re-enter for the breach of other covenants." Citing Burnes v. McCubbin, 3 Kan. 221, 87 Am. Dec. 468.

From 51 CJS, Sec. 102, p. 677, we quote:

"Forfeitures by acts of the parties to a lease, because of a breach of a covenant or condition or wrongful act of the tenant, are not favored by the courts."

See 12 Am. Juris., page 1016, Sec. 436, under "Contracts'.' We quote:

"Forfeitures are not favored by the law; indeed, they are regarded with disfavor. It is well settled that forfeitures by implication or by construction, not compelled by express requirements, are regarded with disfavor. Contracts involving a forfeiture cannot be extended beyond the literal meaning of the words used. Since forfeitures are not favored either in equity or

in law, provisions for forfeitures are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced. Courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation it can be avoided. Forfeitures are enforced only where there is clearest evidence that that was what was meant by the stipulation of the parties."

Quoting from 51 CJS, Sec. 104, p. 684:

"Where grounds of forfeiture are expressly designated in the lease, a forfeiture will not be permitted on other grounds." Citing 112 SE, 512, Easley Coal Co. v. Brush Creek Coal Co.

See 32 Am. Juris, Sec. 848, p. 721, under "Landlord and tenant". We quote:

"Forfeiture Clauses . . . Moreover, the settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable."

We quote from 14 Am. Juris., 481, under title, "Covenants, Conditions and Restrictions":

"It is the general rule that in every case the determination of the question whether a particular clause

or provision creates a covenant or condition subsequent depends primarily upon the intention of the parties. If the language is clear and plain, the intention of the parties is presumed to be what the language clearly purports and the court decides the question from that language. In those cases, however, where the language is ambiguous and may create either a covenant or a condition, the court, in determining whether a covenant or condition was created, actively seeks to ascertain the intention of the parties. One important factor in the consideration of this question which is often controlling, is that if there is any doubt, the Court will favor the construction of a covenant rather than a condition, because conditions are looked upon with disfavor by the courts and all doubtful cases are decided in favor of a covenant construction."

See the case of Joyce v. Krupp, 257 Pac, 124. We quote from that case:

"The distinction between conditions and covenants is a decided one and the principles applicable quite different. A condition is a qualification annexed to an estate, upon the happening of which the estate is enlarged or defeated, and it differs from a covenant, in that it is created by mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only. A breach of a condition on which an estate is granted works a forfeiture of the estate, while the breach of a sole agreement of the covenantor is merely ground for the recovery of damages."

See Conolley v. Power, 232 Pac, 744, (Cal.) In this case the contract between the parties contained this language:

"It is expressly understood, stipulated, and agreed that all of the terms, promises, agreements, and provisions of this lease are express conditions, and not mere covenants, and upon the breach or failure of the lessees to carry out any of the same this lease shall terminate and expire at the option of the lessor, and all rights hereunder shall be forfeited, and the said lessees are to immediately deliver up peaceful possession to the lessor.

"Time and punctuality are material to, and are of the very essence of this agreement, and of every part or portion thereof, to which the element of time and punctuality are applicable."

In interpreting this language, the Court stated that a forfeiture can never take place by an implication, but must be affected by express unambiguous language. As pointed out before, the language in the present lease was certain and unambiguous as to the reason why a forfeiture could be declared and the Court made no finding with respect to that issue, but declared a forfeiture for what the Court said was an implied agreement.

See Easely Coal Co. v. Brush Creek Coal Co., 112 SE, 512. The facts are as follows: The Coal River Mining Company leased certain coal land to Dalton and Bucks. Lessees assigned their interest in the property to the Brush Creek Coal Company. The assignment was made with the consent of the lessor. Later the Brush Creek Coal Company attempted to assign its interest in the property to Easely Coal Company, the plaintiff in this case. The lease contained the clause which reads: "This lease shall not be assigned or mortgaged by the lessees, or any part thereof sublet, except by consent of the lessor in writing."

Plaintiff claimed that the original lessor, by reason of his assent to the assignment to the lessee may now assign his rights as freely as if no restriction upon assignments had been inserted in it.

The Court said:

> "Whether the Coal River Mining Company has the right of re-entry it claims depends upon the interpretation of the lease as to the status of the covenant or condition in question with reference to the re-entry or forfeiture clause"

We quote further from the Court's opinion :

> "Forfeitures of estates are not favored in law. The right to forfeit must be clearly stipulated for in terms, else it does not exist. Every breach of a covenant or condition does not confer it upon the injured party. It never does, unless it is so provided in the instrument. Such breaches are usually compensable in damages, and if the forfeiture has not been stipulated for, it is presumed that the injured party intended to be content with such right as is conferred by the ordinary remedies. The broken covenant or condition relied upon for forfeiture must be found not only in the instrument by clear and definite expression, but also within the forfeiture clause by such expression. A covenant or condition merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture by reason of its breach. Citing cases."

We now address our remarks to the question of consideration. About the time the lease was made and entered into, Jones paid Thorvaldson $21,400.00 for equipment to operate the business of mining and extracting sand

and gravel from the leased premises. TR. 237. Thorvaldson testified that he would not have leased the premises unless Jones had purchased the equipment. TR. 243. Jones testified that he would not have purchased the equipment if he had not obtained a lease for the premises from Thorvaldson, because sand and gravel was necessary for the business. TR. 262.

The lease recited that the Jones should pay 25c per cubic yard for all sand, gravel and top soil mined and sold by the Jones from the leased property and 1c per yard for all fill dirt sold from the leased property. The lease also contains a proviso that Jones must supply all orders and requests of customers and upon failure to do so, the same will constitute grounds for forfeiture.

Thorvaldson had operated the sand and gravel business at this same place for many years prior to the making of the lease (TR. 241) and must have known something about the volume of business the Jones might expect. This provision with respect to filling customers' needs was for his protection and to insure him an income from the property.

This is not a contract where it was wholly optional with the Jones whether they should perform or not. The contract provides that if they should not perform and meet the requirements of customers, then Jones' rights in the property could be terminated. This contract is very analogous to what are termed "requirement contracts". See cases dealing with this question in Williston on Sales, Vol. 2, Sec. 464 a, p. 739-742. We quote from that work:

> "It is true, as a general rule, that if it is wholly optional with one party to a bilateral agreement whether he shall perform or not, there is no legal con-

tract. The promise of that party in such a bargain is illusory; that is, though in form a promise, it is so qualified that the promisor really engages himself for nothing and his illusory promise is insufficient consideration to support a counterpromise. A promise to buy such a quantity of goods as the buyer may thereafter order, or to take goods in such quantities 'as may be desired', or as the buyer 'may want', is not sufficient consideration since the buyer may refrain from buying at his option and without incurring legal detriment himself or benefiting the other party.

"It was held in an early Minnesota case that an agreement to sell all that the buyer might require or want in his business was open to the same objection, though the buyer promised to buy all he should require; but the weight of authority is clearly and rightly otherwise, whether the mutual promises are to buy and sell all that the buyer requires or all that the seller produces. Though it may be true that a seller by ceasing to manufacture may relieve himself from any performance and still keep a promise to sell all the goods that he manufactures, and similarly a buyer by going out of business may avoid performance while still observing the terms of an agreement to buy all that he requires, these results can be obtained only by conduct of the promisor which is in itself a legal detriment, namely, the cessation of business. Even a promise to buy or sell only as much as the promisor chooses is a sufficient consideration for a counterpromise when coupled with the agreement that whatever the buyer or seller chooses to buy or sell he will buy from or sell to the promisee. To put the matter in another way—the promise of a seller not to manufacture except for the buyer, or the promise of a buyer not to buy except from a particular seller, is clearly a promise to do something detrimental."

See Graudis, et al. v. Helfrich, (Mo.) 265 SW 2d, 371. That was an action for breach of contract. Plaintiff promised to disclose the source of a large quantity of coal and in return the defendants promised plaintiffs 50c per ton for each ton of coal defendant purchased or severed from such source. Plaintiff showed that defendant had severed 20,000 tons and the verdict was for plaintiff in the amount of $10,000.00. We quote from a part of the Court's opinion:

> "Defendant initially contends that the purported oral contract was void for want of mutuality; that both parties were not bound by the alleged contract; that defendant did not agree to buy any coal; that there was no consideration for the alleged oral contract . . . . the alleged contract . . . . was unilateral and unenforceable.'
>
> "The agreement entered into between Braudis and defendant constituted a bilateral contract, supported by the respective considerations of mutual promises. Braudis agreed to furnish information which apparently might be beneficial to defendant. Defendant promised (an apparently possible benefit to Braudis) to pay for such information on the condition that he remove coal from the stated source of supply. These mutual promises constituted sufficient consideration for the bilateral contract."

To that effect see Williston on Contracts, Vol. 1, Sec. 104, p. 396.

See Stern v. Premier Shirt Corporation, 103 NE 363. The Court said:

> "Agreements to buy or sell what will be needed or required have been enforced by the Courts with uniformity."

In Allen v. Rose Park Pharmacy, 120 Utah, 608; 237 Pac. 2d, 823, the Court said:

> "Mutual promises in each of which the promisor undertakes some act or forebearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are 'sufficient consideration' for one another."

To the same effect see Genola Town v. Santaquin City, 96 Utah, 88; 80 Pac 2d, 930. We quote from the Court's decision:

> "It is said the contract lacks mutuality of obligation which prevents a court of equity from decreeing specific performance. The argument is that such lack of mutuality arises from the sixth paragraph of the agreement which reads as follows: 'It is understood and agreed between said parties that the Town of Genola is attempting to get a government project to establish its pipe line system and in the event said town does not secure said project and obtain money therefor, then it shall not be liable under this contract.'
>
> "The contention is that mutuality must be determined as of the date of making the contract which was August 18, 1936; that on said date it was impossible to say whether Genola would be bound; that it lay within the control of Genola to determine whether it would be bound or whether it would bind Santaquin. Such is the case with many contracts whose binding effect depends upon a condition precedent, the carrying out of which condition precedent lies within the power of only one of the parties to the contract.
>
> The rule regarding mutuality of obligations as making the contract amenable to specific performance is more honored by exceptions than by obedience to the rule."

The Court held that the contract did not lack mutuality.

Holding to the same effect is a case from California, Lettuce Growers v. Union Sugar Company, 289 Pac 2d, 785.

See Fayette Coal Company v. Lake and Explore Coal Corporation, 23 ALR, 565. In this case there was a contract in which the defendant agreed to take the output of two small mines. There is no definite number of tons specified, nor is there even an estimate as to the number of tons expected to be shipped under the contract. The defendants contend that by the contract, it did not impose upon the plaintiff any duty to operate the mine; that the only obligation imposed upon it was to sell such coal as it produced at the mines to the defendant, and any time the contract became burdensome to it, it could escape the obligation of the same by simply closing down its mine and not producing any coal. The Court says:

> "It must be borne in mind that, when the parties entered into this contract, they intended to accomplish some purpose by it, and this court will not give to it a construction which will render it void, if it can reasonably be interpreted so as to give it effect. There is no uncertainty in the contract, except as to the subject matter thereof, nor does it appear to us that there is very great uncertainty in this regard. The plaintiff had two small mines from which it was producing coal, and the subject-matter of the contract was the output of these mines. The reasonable capacity of the mines at the time the contract was entered into was apparent to anyone reasonably familiar with the coal business, and the defendant, when it purchased the output of these mines, could, and no doubt did, inform itself as to the amount of coal it could reasonably ex-

pect to receive therefrom. Absolute certainty is rarely attainable. All that is required is reasonable certainty. But the defendant insists that there is no obligation upon the plaintiff, under the contract, to operate the mines; that, even though it may be considered that it would have to deliver to the defendant all of the coal that it mined, still it could easily avoid its obligation by simply closing down its plant. But is this true? The plaintiff sold and undertook to deliver to the defendant at a certain price the output of its mines. The parties contracted in relation to the conditions that existed at that time. Could the plaintiff as a matter of law, at any time, cease operations and avoid liability? We do not think so. We think the plaintiff was under the same obligation to operate these mines in the ordinary way, in good faith, that the defendant was to take the coal produced under those circumstances."

On the question of mutuality and consideration, see McMichael v. Price, 58 Pac 2d, 549 (Okla.) The action was instituted by Price doing business as Sooner Sand Company to recover damages for breach of contract. Plaintiff recovered. The action was upon a contract which provides that Price was selling and shipping sand from Tulsa, Oklahoma to various points in the United States and that the second party was the owner of a tract of land described in the lease. The plaintiff, Price, agreed to buy from the second party all the sand of various grades which he could sell. Following the execution of the contract, the defendant was alleged to have failed, neglected and refused to furnish all of the sand which Price sold and defendant expressly repudiated and renounced the contract. We quote:

"Defendant contends that the contract between the parties was a mere revocable offer and is not a valid

and binding contract of purchase and sale for want of mutuality. The general rule is that in construing a contract where the consideration on the one side is an offer or an agreement to sell, and on the other side an offer or agreement to buy, the obligation of the parties to sell and buy must be mutual, to render the contract binding on either party, or, as it is sometimes stated, if one of the parties, not having suffered any previous detriment, can escape future liability under the contract, that party may be said to have a "free way out" and the contract lacks mutuality. (Citing cases) Attention is directed to the specific language used in the contract binding the defendant to 'furnish all of the sand of various grades and qualities which the first party can sell' and whereby plaintiff is bound 'to purchase and accept from second party all of the sand of various grades and qualities which the said first pary (plaintiff) can sell.' It is urged that plaintiff had no established business and was not bound to sell any sand whatever and might escape all liability under the terms of the contract by a mere failure or refusal to sell sand. In this connection it is to be noted that the contract recites that plaintiff is 'engaged in the business of selling and shipping sand from Tulsa, Oklahoma, to various points.' The parties based their contract on this agreed predicate."

The Court said:

"By the terms of the contract the price to be paid for sand was definitely fixed. Plaintiff was bound by a solemn covenant of the contract to purchase all the sand he was able to sell from defendant and for a breach of such covenant could have been made to respond in damages. The argument of defendant that the plaintiff could escape liability under the contract by going out of the sand business is without force in view of our determination, in line with the authorities

hereinabove cited, that it was the intent of the parties to enter into a contract which would be mutually binding."

## POINT II

THE COURT ERRED IN FINDING THAT THE JONES' FAILURE TO REMOVE OVERBURDEN, FAILURE TO MAKE SALES SLIPS AND JONES' REMOVAL OF SAND OFF THE PREMISES WITHOUT ACCOUNTING FOR ANY OF IT, AND FAILURE TO ACCOUNT FOR ALL SALES OF SAND AND GRAVEL CONSTITUTED GROUNDS FOR FORFEITURE.

We submit that there is no competent evidence in the record that the Jones failed to remove the overburden or failed to make sales slips in the manner and at the time as required by the contract, and that Jones failed to account for sand removed from the Thorvaldson property onto the Jones property for purpose of processing the same; but, if it be assumed that the Court's finding regarding these matters is correct, we assert that they afford no basis for declaring that the Jones have forfeited their rights in the property. If the Jones' failure to remove overburden had progressed to the point where they could not supply the needs of customers, then that might afford a basis of forfeiture, but such is not the case. All the other findings relate to matters that are compensable in damages and where such is the case, the Courts will not declare a forfeiture.

It is obvious, from the Court's remarks, that he did not feel the above finding constituted grounds for forfeiture. We quote:

"The ones that I am concerned with mostly would be materials from other sources, the removal of overburden, and the removal of the business from the leased land." TR. 307.

"The overburden, perhaps, could be rectified if there is any default with respect to that. The other matters probably cannot." TR. 307.

As to the Jones' failure to account for income, we quote the Court's remarks after the evidence was all in:

"Failure to account for income. I think there has been some failure, but probably an honest mistake has been made. I think that is insufficient to justify forfeiture of the lease." TR. 306.

We quote from 12 Am. Juris., Sec. 440, p. 1020, under title, "Contracts":

"It is not every breach of a contract or failure exactly to perform—certainly not every partial failure to perform—that entitles the other party to rescind. A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a recision of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom. (Citing cases) Generally the failure of performance in order to constitute a ground for recision must be total, such as to defeat the object of the contract, or render it unattainable. The right to recision does not exist where there has been a substantial, though not literally a complete, performance. (Citing J. W. Ellison Son & Co. v. Flat Top Grocery Co., 71 S. E. 391)

On the question of recision or forfeiture of a contract, see Canepa v. Durham, 153 Pac 2d, 899. We quote:

> "A partial failure of performance is no ground for recision of contract unless it defeats the very object of the contract, renders that object impossible of attainment, or concerns matters of such prime importance that contract would not have been made if default in that particular had been expected."

On the question of forfeiture, see Sonken-Galambra Corp. v. Abels, 95 Pac 2d, 601. We quote from the syllabus:

> "Generally the failure of performance in order to constitute a ground for recision must be total, such as to defeat the object of the contract or rendering it unattainable.
>
> "Generally, forfeitures are regarded with disfavor and an interpretation which does involve a forfeiture is not favored."

Again quoting from 12 Am. Juris., page 1018:

> "Rescision is sometimes warranted by a breach of contract. Where covenants are mutual and dependent, the failure of one party to perform authorizes the other party to rescind the contract. The failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescision thereof. But where the contract has been largely carried into execution, and the engagements of the parties were to be performed in the future, and their performance was not made a condition, but rested merely in covenant, a breach of them lays the foundation of an action, but nothing more."

See Farnsworth v. Minnesota and P.R. Company, 92 U.S., 49. We quote from that case:

"Where the penalty or forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument and the penalty is deemed as an accessory; but in every such case the test to ascertain whether relief can or cannot be had in equity is to consider whether compensation can or cannot be made." (Citing 104 U. S. 88).

See the case of Priddy v. School District No. 78, 39 ALR, 1334. We quote from that case:

"The law is opposed to forfeiture of estates and will not imply a forfeiture where none is expressed by the terms of conveyance. (Citing a number of cases).

"If the forfeiture is not expressed by the terms of the conveyance, an additional use of the property, if it should constitute a wrong, cannot be made the basis for an implied forfeiture , because the deed may happen to provide for a forfeiture for some other act." (Citing cases)

See State, ex rel. City of Tacoma v. Sunset Telephone and Telegraph Company, 150 Pac, 427. We quote from page 432 of the opinion:

"It is a principal of universal application that forfeitures are abhorred in the law and will not be declared, except in the clearest and most positive cases, or where the contract broken so provides in express terms. A forfeiture will be avoided, if possible. The franchise ordinance was not plain and positive that one of the conditions upon which it was granted was that the holders of the franchise should establish, maintain, and operate an automatic system only, during the term of the franchise, for it was authorized also to conduct a general telephone business, and therefore

dedicated its property to public use with all the duties, liabilities and requirements as well as privileges under our constitution and laws, such dedication implied."

See the case of McNeese v. Wood reported in 267 Pac, 877. In this case the lease contained two provisions for forfeiture. One, that if the premises were used for any improper, unlawful purpose that this shall work a forfeiture of the lease. There was another clause which said if the lessess failed to pay rent for a period of 30 days, then the lessee at his option might declare the lease forfeited. The question was whether the 30 days period prevailed or whether under the unlawful purpose use, they could immediately declare the lease forfeited. Upon the first hearing before the Supreme Court, the Court held that the lease could be declared forfeited, but upon rehearing this was reversed and the Court said this:

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

"'Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms.

"A forfeiture can be enforced only when there is such a breach shown as it was the clear and manifest intention of the parties to provide for.

"The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so. (Quoting cases from California)

"References to cases of like import might be multiplied." (Citing a number of cases)

## POINT III

THERE WAS NO COMPETENT EVIDENCE THAT THE JONES EVER OBTAINED SAND OR GRAVEL FROM OTHER THAN THE LEASED PREMISES UNLESS IT WAS NECESSARY TO DO SO TO FILL CUSTOMERS' REQUIREMENTS.

The Court made no finding that the Jones' acquisition of sand or gravel from a source other than from the leased premises violated the terms of the lease; but did remark on this question while outlining his concern about the issues in the case. We, therefore, direct a few remarks to that issue.

Jones testified that as long as he could get gravel from the Oldroyd pit, originally subleased from Thorvaldsons to Jones, he did not go anywhere else for it unless it was a certain specified material that somebody wanted. TR. 267. He also testified that he got very little sand from any other source and that it was specified by the customers as to the other source. TR. 267-268.

We submit that under the evidence, Thorvaldsons' primary purpose in making the lease was for the purpose of selling their sand and that if Jones had failed to supply a customer's needs merely because they could not get the specified gravel from the leased property and thus not make the sale, such action would have been in violation of the terms of the lease.

## CONCLUSION

The Court erred in finding that the Jones' operation of the mix batch plant off the leased premises constituted grounds for declaring that the Jones had forfeited their

rights in the leased premises. The Court also erred in finding that the Jones' alleged failure to remove the overburden and failure to make sales slips and removal of sand off the premises without accounting for any of it and failure to account for all sales of sand and gravel constitute grounds for forfeiture. If there was a breach of these covenants then the remedy is compensable in damages. The Court erred in not finding that the only grounds for declaring a forfeiture was that which was plainly set forth in the lease, to-wit, failure to operate the business so as to adequately and timely fill all orders and supply all requests of customers and that there was no evidence of the Jones' failure in this regard.

Respectfully submitted,

DAVE McMULLIN
20 East Utah Avenue
Payson, Utah

DALLAS H. YOUNG for
YOUNG, YOUNG & SORENSEN
227 North University Avenue
Provo, Utah

Attorneys for Appellants